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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD R. HUGHES, SR.,

*Petitioner,*

v.

UNITED STATES POSTAL SERVICE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED

Whether the lower courts failed to apply a correct standard to determine the proper remedy for violation of a nonstatutory federal right?

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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1984

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RICHARD R. HUGHES, SR.

Petitioner

vs.

UNITED STATES POSTAL SERVICE

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Richard R. Hughes, Sr., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on March 26, 1984.

OPINIONS BELOW

The opinion of the Court of

Appeals is reported at 730 F.2d 967 and is appended to this petition as Appendix A. The opinion of the district court is unreported and is appended to this petition as Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1984. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether the lower courts failed to apply a correct standard to determine the proper remedy for deprivation of a nonstatutory federal right?

## STATEMENT OF THE CASE

On March 18, 1980, petitioner, Richard R. Hughes, Sr., brought suit against the United States Postal Service in the United States District Court for the District of Maryland, alleging that his rights were violated when the Postal

Service removed him from consideration for permanent employment in 1978, and seeking injunctive and monetary relief. Jurisdiction was based upon 39 U.S.C. §409, conferring jurisdiction upon the district courts over actions against the Postal Service. The district court sustained petitioner's claim that the Postal Service's conduct violated its regulations and entered judgment in Hughes' favor, but denied Hughes any relief other than restoration of his name to the list of persons eligible to be hired.

Hughes had been employed by the Postal Service as a temporary employee beginning in 1975. In the course of his employment, Hughes injured his left arm. He filed a claim for worker's compensation and in July 1977 received an award of compensation based upon a 15% permanent partial loss of use of his left arm. While working as a temporary employee, Hughes

filed applications for permanent employment in several different positions, including mail handler. His name was placed upon the hiring register for mail handlers on January 27, 1976.

The Postal Service regulations contained in its Personnel Handbook P-11, Chapter 2, which govern the filling of vacancies for permanent positions, provide for the maintenance of lists of eligibles who have taken the competitive examination, in descending order of examination grades, adjusted by preferential factors for veterans. These lists are known as hiring registers. Eligibles may be removed from the register if they fail to respond to Postal Service notice that a position is being filled or if an objection to their suitability is lodged. Selections for the positions are then made from the remaining names upon the register.

according to the "rule of three," by which each vacancy is filled by selecting one of the three highest persons then remaining upon the register. No specific standards govern this selection. When multiple vacancies are filled, an eligible who is considered three times for a position and is not selected need not be considered again.

In February, 1978, the Postal Service commenced the filling of a number of vacancies for the position of mail handler. "Call-in notices," announcing the vacancies and soliciting applications, were sent to the persons whose names appeared upon the register, including Hughes. Hughes completed and submitted an application.

During the hiring process, Hughes was removed from the register, allegedly on account of a question of medical suitability due to his earlier

injury. Thus, he was not considered when appointments were made . The reasons for his removal from the register and the propriety of the removal decision were the subject of some dispute at trial. Defendant sought to prove that Hughes had been determined by a Postal Service physician to be medically unsuited for the position because of his disability. Hughes contended that his medical suitability was not the basis of the decision and that the Postal Service physician had never actually made a determination as to Hughes's suitability and ability to perform the job. Hughes also presented medical evidence at trial that he was able to perform the duties of a mail handler, which evidence was controverted by the Postal Service.

The district court based its decision in Hughes's favor upon the failure of the Postal Service to abide

by its regulations in making the determination of Hughes's suitability. The court entered judgment requiring the Postal Service to reinstate Hughes to the register of eligibles but refused to award any monetary relief or other relief, rejecting Hughes's claim that his removal from the register was tantamount to denial of a position. The Fourth Circuit affirmed, stating that the district court did not abuse its discretion. Both courts stated that the uncertainty, due to the "rule of three," whether Hughes would have been hired had he remained upon the register was a failure of petitioner to sustain his burden of proof.

REASONS FOR GRANTING THE WRIT

Due to the unusual factual and legal settings of this case, resolution of the issues it presents would have extended and important

application. The factual setting is unusual because the structure of the Postal Service hiring process, resulting in the impossibility of a finding that petitioner would have been hired or would not have been hired, isolates the allocation of burden of proof as the critical factor on the issue of remedies in particularly dramatic fashion. The legal setting is unusual because of the absence of statutory or case law standards to govern that allocation or to mandate applicable remedial concepts. The Fourth Circuit's cursory disposition of these issues cannot mask the far reaching import of a decision upon the remedial issue in these settings.

The district court found that Hughes had proven a legal wrong on the part of the Postal Service; this conclusion was not appealed. Thus the issue was solely what remedy existed

to redress the injury resulting from that established wrong.

Due to the employment of the "rule of three," neither party could prove at trial in 1981 whether Hughes would have been selected for a position in 1978 had he not been removed from the hiring register; the unstructured and unregulated nature of the selection decision made such proof impossible for either party. Thus, whichever party was assigned the burden of proof - the risk of nonpersuasion - necessarily would fail to carry this issue because unable to adduce proof sufficient to sustain the burden. Assignment of the burden of proof therefore amounted to decision of the issue. This fact requires location of the appropriate principles to allocate the burden.

The Fourth Circuit's analysis began and ended with its elliptical

statement: "A plaintiff has the burden to prove his case." It noted that the case did not involve discrimination under a federal statute and refused to recognize as analogous those principles developed in cases involving statutory employment violations because no statutory violation was presented herein.

This amounted to a failure to apply any principle at all. Allocation of the burden of proof is not made upon a blank slate. Rather, it is affected by the policies and law underlying and governing the legal issue upon which proof is adduced. Numerous considerations may bear upon allocating the burden. For example, the important policy of eliminating vestiges of discrimination justifies imposing upon the employer sued under Title VII the burden of showing that an applicant would not have been hired. See , e.g., Albermarle Paper Co. v. Moody, 422

U.S. 405 (1975). For example, the equity inherent in resolving any uncertainty in recreating the past against the party whose unlawful action caused the problem justifies the imposition of the burden upon that party. See, e.g., Day v. Mathews, 530 F.2d 1083, 1086 (D.C.Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 266 (4th Cir. 1975). As another example, superior knowledge of one party may justify placing the burden upon that party. E.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977). The point is not that the statutory cases directly govern this case; they do not. The point is that the assignment of the burden of proof depends upon factors more complex than those considered by the courts below. Indeed, the authority cited by the Fourth Circuit, Kohlsaat v. Parkersburg & Marietta Sand Co., 266

F. 283 (1920), declares that the burden of proof depends upon the substantive law of the case.

Unlike the statutory discrimination claims, there is no governing framework of remedial principles applicable to this case. The wrong to which petitioner was subjected was agency action illegal because inconsistent with its own regulations. See 39 U.S.C. §1001(e); Service v. Dulles, 354 U.S. 363 (1957). Thus, the only standards available to govern the lower courts were general precepts guiding federal courts in fashioning relief for deprivation of federal rights.

There are such standards, and they flow from the basic principle, discussed in Bell v. Hood, 327 U.S. 678, 684 (1946), that "[w]here federally protected rights have been invaded..courts will be alert to adjust

their remedies so as to grant the necessary relief...." See also Davis v. Passman, 442 U.S. 426, 433 (1964); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-293 (1960). It is apparent that the make-whole principle of remedies follows from this rule. The Fourth Circuit's analysis of the burden of proof issue pretermitted direct consideration of the make-whole principle; its determination that the inability of either party to prove the outcome of the hiring process was a failure to be charged to Hughes required it ot hold that wages for a job for which Hughes could not prove he would have been selected would make him more than whole. This illustrates the inseparable connection between the burden of proof and the underlying policy and legal issues, and highlights the court's error in believing that it could resolve the

burden of proof issue without considering that connection.

It was petitioner's contention that to make him whole required monetary relief. Each court replied by stating that petitioner failed in his burden -- thus answering the issue by its method of posing the question. No court in this case has considered what standard governs the remedy.

This question has significance far beyond the narrow dispute between Hughes and the Postal Service over the proper remedy for violation of a narrow set of regulations. Not only is there no pronouncement from this Court governing this issue in a claim not based upon any federal statute, but there appears to be a paucity of lower court authority. Any remedial principle announced would have potential application to other nonstatutory claims

such as direct actions under the Constitution. The wide range of cases affected and the close relationship of this issue to very basic issues of remedial federal jurisjurisprudence make review appropriate.

It should also be noted that there is a growing number of cases involving non-statutory review of Postal Service employment decisions. E.g., Withers v. United States Postal Service, 417 F.Supp. 1 (W.D.Mo. 1976); Oakes v. United States Postal Service, 444 F.Supp. 100 (S.D.N.Y. 1978); Neal v. United States Postal Service, 468 F.Supp. 598 (D.Utah 1979); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974). Apart from the wider effect of this case, that the potential application of such principles to an important United States instrumentality would not be insignificant.

## CONCLUSION

For the reasons stated, it is respectfully prayed that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 81-2212

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Richard R. Hughes, Sr., Appellant,

v.

United States Postal Service, Appellee.

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (80-644)

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Argued: February 8, 1984

Decided: March 26, 1984

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Before WIDENER, HALL and PHILLIPS, Circuit Judges

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James J. Nolan, Jr. (W. Michel Pierson on brief) for Appellant; Lynn D. Poole, Office of Labor Law, United States Postal Service (D. Richard Froelke, Assistant Counsel on brief) for Appellee.

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HALL, Circuit Judge:

Richard R. Hughes, Sr., appeals from the district court's decision limiting the relief to which he was entitled to the restoration of his name to the United States Postal Service's hiring register for mail handlers. Finding no error, we affirm.

I.

Hughes was first hired by the Postal Service as a temporary or "casual" employee[1] in November, 1975. He was employed as a clerk and was assigned various tasks, which included sweeping and filing mail, carrying trays of mail, handling mail sacks, and loading and unloading postal trucks.

On December 22, 1975, Hughes injured his left shoulder while at

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1/ As a "casual employee," Hughes did not hold a permanent position but was limited to tours of duty not exceeding 89 days.

work. The following day, he was seen by Dr. Georgina Goodwin, the Postal Service's medical officer, who prescribed pain medication and heat treatments. Hughes was able to complete the remainder of his eighty-nine day term of employment, and after its expiration, he was rehired for another term.

On February 23, 1976, Hughes reinjured his left shoulder while unloading a mail sack from a truck. He again saw Dr. Goodwin and later visited a hospital where he was referred to Dr. Lawrence Blumberg, an orthopedic surgeon. Dr. Blumberg first saw Hughes on March 2, 1976, and initially diagnosed the injury to be torn muscles and ligaments. He subsequently determined the injury to be bursitis of the left shoulder and prescribed physical therapy and cortizone injections. On April 19, 1976, Dr. Blumberg released Hughes to return to

work "without limitation." After a follow-up consultation on October 4, 1976, Dr. Blumberg determined that Hughes had suffered a fifteen percent permanent partial disability of the left upper extremity.

As a result of the injury to his arm on February 23, Hughes missed approximately two months of work. He returned to work and served out the remainder of his term, and eventually was rehired for a third eighty-nine day term as a clerk. In the meantime, Hughes filed a claim for compensation for his injury and was awarded compensation for a "15% permanent partial loss of use of left arm."

Hughes had previously submitted an application for a permanent position as a mail handler. Mail handlers load and unload mail sacks from trucks and transport, open, and dump the sacks onto

various pieces of sorting equipment. The sacks weigh up to seventy pounds. Consequently, the Postal Service's qualification standards for the position of mail handler require that an applicant pass a strength and stamina test.[2/] The Postal Service's Personnel Handbook sets forth the method by which vacancies are filled. Registers of eligible employees are maintained in descending order of grades on written examinations with preferences given to veterans. All eligibles on the register are first required to respond to a notification that the Postal Service has openings for a particular position and plans to select one or more eligibles from the register for that position. They are then required to complete application forms.

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[2/] The Postal Service's qualification standards for mail handlers provide that:
(footnote, cont'd)

The returned notices are reviewed, and applicants are subsequently scheduled for a pre-appointment interview. In addition, the qualification standards for mail handler require that an applicant, whose rating is high enough to be considered for appointment, be called for a strength and stamina test. Selections are then made from the names on the register according to the "Rule of

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Test of strength and stamina.--
When a post office has a job opening and the applicant's rating is high enough to be considered for appointment, the applicant will be called for a test of strength and stamina. The test will consist of lifting, shouldering, and carrying mail sacks weighting [sic] 70 pounds, pushing a handtruck, and loading and unloading mail sacks of various weights. When persons are within reach for appointment, they will be notified when and where to report for the test of strength and stamina. Persons with certain physical conditions will not be permitted to take the test of strength and stamina without the prior

Three," pursuant to which each vacancy is filled from among the three highest-rated eligibles. Finally, any eligibles so selected must take and pass a medical examination before a final appointment may be made.

Hughes passed the written examination for mail handler. Based on his examination score and a veteran's allowance, Hughes' final rating was 95.7, and his name was placed on a register of eligibles. On February 6, 1978, Hughes was notified that his name had been

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approval of a physician. These physical conditions are:

a. hernia or rupture
b. back trouble

c. heart trouble
d. pregnancy
e. any other condition which makes it dangerous to the applicant to lift and carry 70-pound weights.

Persons with these physical conditions will be given special instructions at the time that they are notified to report for the test.

reached on the register for appointment consideration, and he responded that he wished to be considered.

On February 16, 1978, Ellen Snyder of the Postal Service's personnel office contacted Dr. Goodwin. Snyder informed Dr. Goodwin of Hughes' fifteen percent permanent partial disability to the left arm and requested an opinion as to his medical suitability for employment as a mail handler. Based on the nature and extent of the disability and the duties which the position entailed, Dr. Goodwin expressed her opinion that the disability rendered Hughes medically unsuitable for employment as a mail handler.

Accordingly, Hughes' name was removed from the register, and he was notified that he had been found to be "not medically suited for Postal Employment." Hughes was determined to be medically unsuitable without ever being

afforded the opportunity to take a test of his strength and stamina.

On March 18, 1980, Hughes instituted this action seeking , inter alia, a mandatory injunction requiring the Postal Service to restore his name to the register and damages for the wages lost as a result of the Pstal Service's actions. The district court dismissed three of the four causes of action advanced by Hughes in his complaint. The only theory of liability that the district court permitted to be litigaged was Hughes' claim that the Postal Service had misapplied its rules and regulations in processing his application.[3/]

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[3/]The other theories under which Hughes alleged that he was entitled to recover included: a private action for discrimination against the handicapped under 39 U.S.C. §1003; a cause of action under the due-process clause of the Fifth Amendment; and a cause of action implied from 5 U.S.C. §1003(b) for retaliation for filing a workman's compensation claim. The district court dismissed these causes of action, and Hughes does not contest that ruling on appeal.

Following a bench trial, the district court determined that the Postal Service had failed to follow the language of its regulations when it did not afford Hughes the opportunity to take a strength test as required by the Pstal Service's qualification standards. The district court, therefore, ordered that Hughes' name be restored to the register. The district court viewed as inappropriate any award of monetary relief to Hughes. The court concluded that "there is no proof whatsoever that Mr. Hughes would have been hired as a mail handler even had he taken and passed the strength test." Hughes appeals.

II.

On appeal, Hughes contends that the district court denied adequate relief to him and that the denial was erroneous because it was based upon an

illogical allocation of the burden of proof and violated fundamental remedial precepts.[4/] We disagree.

Hughes argues that the district court erred by failing to place upon the Postal Service the burden of proving that he would not have been selected as a mail handler. Hughes concedes that this burden would have been "impossible" to carry, but nonetheless he asserts that in the absence of evidence to the contrary, the district court should have awarded him monetary relief based upon the "supposition" that he would have been hired as a mail handler. We will

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[4/] Hughes' reliance on cases involving claims arising under the civil rights statutes, 42 U.S.C. §§1981, 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., is misplaced. This is not a discrimination case. The district court dismissed Hughes' causes of action for discrimination, and Hughes has not appealed from that ruling.

not indulge in such speculation.

A plaintiff has the burden to prove his case. Kohlsaat v. Parkersburg & Marietta Sand Co., 266 F. 283 (4th Cir. 1920). Under the "Rule of Three," Hughes had no assurances that he would be the employee selected from the register. The placing of Hughes' name on the register was not the equivalent of appointing him to a permanent position of mail handler. He was merely an applicant for employment. Even as one of the top three, Hughes would have remained subject to the vagaries of the selection process. Thus, the district court's finding that Hughes failed to prove he would have been selected is not clearly erroneous. In holding that Hughes had been improperly denied an opportunity to take the strength and stamina test, it was appropriate for the district court to order that Hughes'

name be restored to the register of eligibles for the position of mail handler. Nothing more was required.

Next, Hughes argues that the district court disregarded the fundamental remedial precept of making the injured party whole in refusing to award him monetary relief. We cannot agree. Any award of money would be based, of course, upon some theory that the Postal Service should have employed Hughes, but as we have already said, Hughes did not prove he would have been selected. The district court was correct in placing Hughes in the circumstances where he would have been without making any conjectures as to the outcome of the selection process. The mere fact that the Postal Service may have violated one of its regulations does not necessarily mean that the Postal Service is subject to the entire

panoply of possible remedial action which a court might impose. Cf. Page v. Bolger, 645 F.2d 227, 232 n.10 (4th Cir.), cert. denied, 454 U.S. 892 (1981) ("That...the [postal] regulation...would be entitled to enforcement by a federal court, does not in our view mean that, if violated, its violation must be redressed as if it constituted a direct violation of substantive provisions of Title VII.") Moreover, the Postal Service's violation of its regulation was neither willful nor meanspirited, but simply a good-faith misinterpretation. Under these circumstances, we cannot sanction the taking of money from the public fisc in the manner proposed by Hughes. Accordingly, we hold that the district court did not abuse its discretion in refusing to award monetary relief.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICHARD R. HUGHES,SR. :

Plaintiff :CIVIL ACTION No.
vs. R-80-644
:
UNITED STATES POSTAL SERVICE :

Defendant :

OPINION

The above-captioned case was tried before the Court on June and 30, 1981. Plaintiff instituted the action under 39 U.S.C. §409(a), alleging that defendant, without complying with its regulations, removed plaintiff's name from its hiring register on the ground that plaintiff was not medically suited for postal employment.

FINDINGS OF FACT

Richard R. Hughes, Sr., was first hired by the Postal Service as a temporary or "casual" employee in

November, 1975. At that time, he was given a pre-employment physical examination by the postal medical officer, Dr. Georgina Goodwin. Mr. Hughes was employed as a clerk, and as such was assigned various tasks, which included handling mail sacks, loading and unloading postal trucks, and sweeping mail.

In December, 1975, Mr. Hughes injured his left shoulder while at work. The following day he visited Dr. Goodwin who prescribed pain medication and heat treatments. Mr. Hughes was able to complete the remainder of his 89 day term of employment and, after its expiration, he was rehired for another term.

On February 23, 1976, Hughes reinjured his left shoulder while unloading parcels from a truck. He again saw Dr. Goodwin, and later visited

a hospital where he was referred to Dr. Lawrence Blumberg, an orthopedic surgeon. Dr. Blumberg first saw Mr. Hughes on March 3, 1976, and initially diagnosed the injury to be muscle tear. He subsequently determined the injury to be bursitis of the left shoulder joint, and prescribed a treatment of physical therapy and cortisone injections. On April 19, 1976, Dr. Blumberg released Mr. Hughes to return to work "without limitation." After a follow-up consultation on October 4, 1976, Dr. Blumberg determined that Mr. Hughes had suffered a fifteen percent permanent partial disability of the left upper extremity.

As a result of the injury to his arm on February 23, Mr. Hughes missed approximately two months of work. He returned to work and served out the remainder of his term, and eventually

was rehired for a third 89 day term as a clerk. In the meantime, Mr. Hughes filed a claim for compensation for his injury and was awarded 46.8 weeks of compensation for a "15% permanent partial loss of use of left arm."

Mr. Hughes had previously taken a written examination for a permanent position as a mail handler. Based on his examination score and a veteran's allowance, Mr. Hughes' final rating was 95.7, and his name was placed on a register of eligibles. On February 6, 1978, Mr. Hughes was notified that his name had been reached on the register for appointment consideration.

On February 16, 1978, Ms. Ellen Snyder of the Postal Service's personnel office contacted Dr. Goodwin. Ms. Snyder informed Dr. Goodwin of Mr. Hughes' fifteen percent permanent partial disability to the left arm and

requested an opinion as to Mr. Hughes' medical suitability for employment as a mail handler. Based on the nature and extent of the disability and the duties which the position entailed, Dr. Goodwin expressed her opinion that the disability rendered Mr. Hughes medically unsuitable for employment as a mail handler. Dr. Goodwin could not recall whether she consulted Dr. Blumberg's reports, although she testified that it was her practice to examine an applicant's medical records when making a determination of medical suitablity.

Based on Dr. Goodwin's determination, Mr. Hughes' name was removed from the register and he was notified that he had been found to be "not medically suited for Postal Employment." Mr. Hughes was determined to be medically unsuitable without ever being afforded the opportunity to take

a test of his strength and stamina.

CONCLUSIONS OF LAW

The regulations which governed the making of appointment and medical determinations in this case are contained in Chapter 3 of the Postal Service Personnel Handbook (P-11, TL-4, 12-31-75), as amended by Postal Bulletins, and in the Postal Service Qualification Standard for Mail Handler (P-12B, TL-1, 3-1-77).

The Handbook states that authority to determine suitability for employment is vested in the postal installation head except, inter alia, as provided by §324. That section provides that the authority of the postal installation head "does not include authority to determine that an individual does not meet the physical requirements for employment. The Postal Service medical officer *** is

responsible for determining that applicants do not meet physical standards." (Emphasis in original.)

"At the time the postal installation head reviews the application," §321.81 directs that:

> if there is a question about physical condition, the application is forwarded to the appropriate postal medical officer. He or she must be certain the medical officer has sufficient information to arrive at a determination. The medical officer must consider the following factors in making a recommendation:
>
> a. The type of position for which application has been made and the duties involved including working and environmental factors.
>
> b. The statement made by the eligible on application concerning the disability, its nature and its limitations, if any.
>
> c. Whether or not physical standards should be waived.
>
> d. Employment record with particular attention to past Federal employment.

> e. The physical standards of the Postal Service as they apply to the position or job concerned and to the disability of the eligible.

The Postal Service's physical standards, specifically as they relate to applicants with orthopedic disabilities, are discussed at §331.4. Besides these Handbook provisions, the Postal Service Qualification Standard for Mail Handlers provides in relevant part:

> Test of strength and stamina--When a post office has a job opening and the applicant's rating is high enough to be considered for appointment, the applicant will be called for a test of strength and stamina. The test will consist of lifting, shouldering, and carrying mail sacks weighting [sic] 70 pounds, pushing a handtruck, and loading and unloading mail sacks of various weights. When persons are within reach for appointment, they will be notified when and where to report for the test of strength and stamina. Persons with certain physical conditions

> [e.g., those which make it dangerous to the applicant to lift and carry 70-pound weights] will not be permitted to take the test *** without prior approval of a physician.

The undisputed evidence adduced at trial was that Mr. Hughes' final rating was 95.7, which placed him near the top of the Mail Handler register. Indeed, the Postal Service notice, dated February 6, 1978, stated that Mr. Hughes' name had "been reached on our register of eligible for appointment consideration as a Mail Handler***."

Thus, the Court finds that the Postal Service failed to comply with its regulations when it did not afford Mr. Hughes the opportunity to take a strength test as required by the Qualification Standard.[1/] Counsel for the Postal Service argued that a

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1/ Plaintiff's counsel also argued that the postal medical officer must examine (footnote cont'd)

strength test need not be administered until after an applicant is tentatively selected for appointment. The language of the regulation will not support such a contention. The Qualification Standard speaks in terms of having a "rating high enough to be considered for appointment," and being "within reach for appointment." The quoted language describes precisely Mr. Hughes' situation as of February 6, 1978, when he was notified that his name had been reached on the register "for appointment consideration."

The Court concludes that Mr.

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an applicant before determining the applicant to be medically unsuitable. The ruling with regard to the Postal Service's failure to offer Mr. Hughes a strength test renders it unnecessary to reach the issue of when an applicant must be examined. The Court would observe, however, that the regulations contained in the Handbook are anything but clear on the matter, and some clarification may be in order.

Hughes is entitled to reinstatement to the register of eligibles for the position of mail handler. Monetary relief is inappropriate, however, since there is no proof whatsoever that Mr. Hughes would have been hired as a mail handler even had he taken and passed a strength test.

SO ORDERED this 13th day of August, 1981.